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ABSTRACT

Noting that the "marketplace of ideas" metaphor often used in the study of freedom of speech is drawn from classical economics, this paper cites J. Murray's definition of the concept as "the idea that citizens in a democracy are well served if opinions of all kinds, accurate or inaccurate, are freely circulated." The first section of the paper traces the historical development of the metaphor, beginning with an examination of the image of truth competing with falsehood that emerged in political argument in the Reformation and later became part of the political language of the American colonies. It then traces this image in the legal language of American courts, pointing out that it was first used in 1919 by a United States Supreme Court justice, who used it as an economic metaphor in a dissenting opinion. The second section of the paper examines the use of the economic metaphor in United States Supreme Court opinions, where it was held that when ideas compete for acceptance, free of regulation, audiences will accept the good (true) ideas and reject the bad (false) ones. The paper argues that Supreme Court justices have also used the metaphor to draw upon a whole structure of economic terms, concluding that although the image is composed of terms that suggest commitment to a laissez-faire principle, its expression as an economic analogy allows the justices to draw upon such concepts as fraud, regulated monopolies, and Gresham's law, which permits both flexibility in decision making and commitment to a shared value. (FL)

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THE MARKETPLACE OF IDEAS:

AN ECONOMIC ANALOGY FOR FREEDOM OF SPEECH

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Abstract

THE MARKETPLACE OF IDEAS:

AN ECONOMIC ANALOGY FOR FREEDOM OF SPEECH

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This paper is about the concept of the "marketplace of ideas." In the first section of the paper, the author examines the image of truth competing with falsehood which emerged in political argument in the Reformation, and became part of the political language of the American colonies. The image of truth competing with falsehood was introduced into legal language in 1919, when a U.S. Supreme Court Justice wrote it into a dissenting opinion, where he expressed the image as an economic metaphor.

In the second part of this paper, the author examines the use of the economic metaphor in U.S. Supreme Court opinions. The metaphor's accepted meaning is the idea that when ideas compete for acceptance, free of regulation, audiences will accept the good (true) ideas and reject the bad (false) ideas. The author argues that Supreme Court justices have also used the metaphor to draw upon a whole structure of economic terms. Although the image is composed of terms which suggest commitment to a laissez-faire principle, its expression as an economic analogy allows justices to draw upon such concepts as fraud, regulated monopolies, and Gresham's law. This allows both flexibility in decision-making and commitment to a shared value.

For people who study freedom of speech, the concept of a "marketplace of ideas" is a familiar image. As Ginsburg points out, "the metaphor of a competitive marketplace of ideas is fully enshrined in our understanding of the First Amendment."[1] This image, say Gillmor and Barron, "has become an underlying theme of First Amendment theory."[2] The phrase itself is a popular one for essay titles in both legal and communication periodicals. Murray defines the "marketplace of ideas" as "the idea that citizens in a democracy are well served if opinions of all kinds, accurate or inaccurate, are freely circulated. . . ." He says:

> The metaphor is borrowed from classical economics wherein the marketplace would determine the quality and distribution of goods if the market were free of controls by government or monopolists. In a free marketplace of ideas, error is tolerated because truth will emerge from the clash of differing opinions.[3]

The metaphor thus draws on a model of laissez-faire economics in which speakers are producers, messages are goods or services, and audiences are consumers. Such a market, according to classical economic theory, is self-regulating and most efficient when free of external controls. In this paper I examine the metaphor of the "marketplace of ideas." My examination includes an explanation of the historical development of the image and an investigation of how it is used by the United States Supreme Court to explain free speech.

THE DEVELOPMENT OF THE METAPHOR

Truth and Falsehood Compete

First Amendment scholars usually note that the idea behind the metaphor is the notion that truth overcomes falsehood, which they attribute to John Milton's 1644 essay Areopagitica. In fact, the image of truth overcoming falsehood appears in English political speech at least as early as the sixteenth century. According to Siebert:

> Implicit in the theory of the Reformation was the principle that there was a definite, discernable, and discoverable truth in religious doctrine, the presentation of which could not fail to convince the unbeliever. Freedom to present these truths would result in conversion.[4]

The truth-over-falsehood image is apparent in Peter Wentworth's 1576 speech to Parliament, objecting to Queen Elizabeth's order that Parliament not consider certain subjects, including her own succession. He asked, "And how can truth appear and conquer until falsehood and all subtleties that should shadow and darken it be found out?"[5] The theme was a common one among political pamphleteers of the seventeenth century. Henry Robinson in March of 1644 stated, "No man can have a natural monopoly of truth, and the more fully each man exercises his own gifts in its pursuit, the more of truth will be discovered and possessed."[6] William Prynne even entitled his 1645 pamphlet Truth Triumphing Over Falsehood.[7] The most famous articulation of this idea today is its appearance in John Milton's pamphlet attacking the licensing system:

> And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do

injuriously, by licensing and prohibiting to misdoubt her strength. Let her and Falsehood grapple; whoever knew Truth put to the worse in a free and open encounter.?[8]

The Areopagitica attracted little attention among Milton's contemporaries, but it was reprinted almost a century later in the wake of the controversial Zenger trial in New York.[9] The idea that "when Truth and Error have fair play, the former is always an overmatch for the latter" became a common theme of the rebelling colonies and an image for expressing liberal ideology in the new republic. Thomas Jefferson used it in his first inaugural address.[10] According to Smith, "As a revolutionary strategy, the marketplace of ideas concept had the advantage of placing its adherents on the side of individual rights and reason--especially when suppression was attempted."[11]

In writing about the truth-over-falsehood image, the political writers of the seventeenth and eighteenth centuries emphasized the power of truth. Others writing in the nineteenth century placed the emphasis on the competitive process itself. John Stuart Mill, in his 1859 argument in favor of freedom of discussion, argued that restricting expression was wrong for four reasons. First, silenced opinions may be true. Second, opinions may be true in part, and their expression serves to clarify or illuminate alternative opinions. Third, if opinions are false, their expression will serve as a contrast to the truth of other opinions. Finally, without expression of diverse opinions, true opinions will lose their vitality, becoming "a mere formal profession."[12] Mill expressed no assumptions about the power of "Truth," but his arguments, like those of the Puritan pamphleteers, rely on an image that describes competition.

Until the early part of the century, the truth-over-falsehood idea seems

to have remained in the political arena, without influencing the common law. In fact, its function of expressing libertarian ideology made it highly unlikely that a court would invoke it. According to Rabban, before World War I the Supreme Court considered a wide range of cases involving issues related to free speech. He says that "with one minor exception, uniformly found against the free speech claimants." In order to construct a libertarian theory of interpretation of the First Amendment, he says, a court would have to either ignore or repudiate this tradition of judicial hostility.[13] After World War I, a number of court cases created free speech controversies. Judicial rulings in these cases, which arose from the Espionage Act of 1917, attracted considerable critical comment, especially from the political left. According to one historian, several editors of The New Republic, who disagreed with court decisions in what are now called the "early Espionage" cases, persuaded the magazine's editor to protest the decisions. In response, the editor asked a few law professors to write articles relating the decisions to "freedom of speech and to the general traditions of Anglo-American Law. . . ."[14] One Harvard professor, Zechariah Chaffee, explained in a November 1918 New Republic article that, "One of the most important purposes of society and government is the discovery and spread of truth" which he claimed has a "natural advantage over falsehood."[15] The next summer he expanded on this idea in an article in the Harvard Law Review.

> The First Amendment protects two kinds of interests in free speech. There is an individual interest, the need of many men to express their opinions. . .and a social interest in the attainment of truth. . . .Truth can be sifted out from falsehood only if the government is vigorously and constantly cross-

examined. . . .

. . . . . .

The great trouble with most judicial construction of the Espionage Act is that this social interest has been ignored and free speech has been regarded as merely an individual interest. . . .[16]

According to Rabban, Chaffee's version of the First Amendment did not reflect the opinions of appellate courts before that time. Rabban argues that Chaffee's article is a "misrepresentation of the judical tradition before World War One" as well as a "misconstruction" of the meaning of the term "clear and present danger" as it was used in an earlier case by Supreme Court Justice Oliver Wendell Holmes. Rabban believes, "Chaffee allowed the passion of his personal committment to a libertarian construction of the First Amendment to overwhelm disinterested scholarship."[17]

In what appears to be a classic example of lobbying the Supreme Court, Chaffee's colleague, Harold Laski, who had promised Chaffee that, "I'll go to the stake for every word" of the article, gave the article to Justice Holmes, and arranged for Holmes and Chaffee to meet.[18] In the fall of 1919, the U.S. Supreme Court considered the case of Abrams v. United States, which arose out of a 1918 amendment to the Espionage Act. Among the supporting points included in the plaintiffs' brief were the quotation from Milton's Areopagitica and a quotation from Thomas Jefferson's 1801 inaugural address.[19] When the Court announced its decision in November, Justices Holmes and Brandeis dissented. The dissenting opinion, authored by Holmes, expressed the truth-over-falsehood image as an economic metaphor.

But when men have realized that time has upset many fighting faiths, they may come to believe . . . that

> the ultimate good desired is better reached by free trade in ideas--that the best test of truth is the power of the thought to get itself accepted in the open market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.[20]

Since Holmes invoked this image, it has been frequently quoted, and the image itself has been used in subsequent court opinions.

Ideas Compete in the Marketplace

The comparison of the communication process to a free market economy was part of Holmes's and Brandeis's development of the "clear and present danger" standard. The origin of the economic analogy is a problem still to be solved. Holmes may well have been the first to use it in this context.[21]

One early reference to the 1919 "marketplace of ideas" is Zechariah Chafee's criticism of it. In a 1941 statement, he expressed doubts about whether the model of a marketplace provided a realistic philosophy for freedom of the press. Pointing to the contributions of modern psychology, Chaffee noted that "reason is less praised now than a century ago; instead, emotions conscious and unconscious are said to dominate the conduct of men." He also noted that that eighteenth century rationalists "assumed human nature to be like the rest of nature, with an inner tendency toward harmony," and argued that "there are no such harmonies. . . . We have found that we cannot depend on unmanaged processes, whether in economics or in communications. We need more effective methods of self-correction. We cannot rely merely on automatic action." In spite of these obstacles, Chaffee concluded "the main argument of Milton and Mill still holds good."[22]

Since Holmes articulated the metaphor and Chaffee popularized it, it has been used in many judicial opinions and by many law professors who write about judicial opinions. It is an image that many recognize and some criticize. Critics of the metaphor of the marketplace raise three major points. These are the image's foundation in what they believe is an Enlightenment philosophy, the image's implications about the nature of truth, and the appropriateness of the metaphor to a society dominated by modern communications industries.

Schauer agrees with Chafee that the assumptions about audiences are based in a previous age. He says "the naivete of the Enlightenment has since been largely discredited by history and by contemporary insights of psychology. People are not early so rational as the Enlightenment assumed. . . ." [23] Others disagree with the image's implications about truth. Most of these critics point to the relative nature of truth under a marketplace theory. As Anastaplo observes, markets fluctuate. Thus, "there is nothing fixed or certain about 'truth.'"[24] Berns expands on this, asking, "Does it mean the 'thought' that wins acceptance in the market will, whatever its substance, be labeled the truth?" Jacobsohn asks a similar question and argues, "Unless truth is defined as the will of the strongest, then there is no empirical support for Holmes's argument." He views the concept as a "positive assertion of opinion elevated to the status of constitutional truth. . . . in a word, judicial dogma."[25] Schauer calls this the "consensus theory of truth" and argues:

> A form of subjectivism that defines truth solely in terms of the strength of an opinion in the marketplace of ideas is so totally at odds with the idea of truth embodied in our language of evaluation as to be virtually useless. A

> theory of majority rule for truth distorts out of all recognition our use of words like "truth", "good", "sound", or "wise".[26]

These critics fault the marketplace concept for subjectivity, but C. Edwin Baker believes it promotes a view of truth that is too objective. "[T]ruth is not objective," he says. "Instead, knowledge depends on how people's interests, needs, and experiences lead them to slice and categorize an expanding mass of sense data." The marketplace concept, he believes, assumes that truth is "objective" or "discoverable."[27]

Finally, some critics attack the concept because they believe it is inappropriate to a society dominated by modern communications industries. According to this view, the market has been monopolized. Barron, for example, calls the idea that the marketplace is freely accessible a "romantic illusion".[28] Head and Sterling assume the validity of the marketplace concept but believe it does not apply to the modern marketplace. They say:

> Entry into the marketplace is prohibitively costly for most traders. Giant media conglomerates like the television networks distribute ideas throughout the national market. . . . A few national media can saturate the entire country with an idea overnight, raising questions as to whether the self-righting process has had enough time to run its course.[29]

People who raise this point often suggest that the market should be regulated, because it is no longer free. Baker describes this view as the "market failure theory."

The "marketplace of ideas" is a powerful image in the vocabulary of free speech. The history of the truth-over-falsehood idea in political pamphlets

and magazine articles illustrates how people attempt to control power by manipulating a symbol which, in turn, creates and sustains an ideology. The transformation of the truth-over-falsehood idea into an economic metaphor endows the image with additional power. The metaphor of the marketplace is what Lakoff and Johnson call a structural metaphor, a metaphor which allows us "to use one highly structured concept to structure another."[33] In this instance, the highly structured concept of free market economics structures the concept of the communication process. If the idea's transformation as a metaphor made it more powerful, its use in an Supreme Court opinion made it more credible. Its use by Holmes made it seem to be a neutral "legal" principle rather than a persuasive "political" statement. It has become part of the vocabulary surrounding the First Amendment.

Thus far I have examined this image historically. In the remainder of this paper I examine the way the metaphor exists in the present in United States Supreme Court opinions. This part of the paper is not a standard case analysis that examines rulings and precedent from one case to another in order to trace the development of law. Rather, it uses the complete text of judicial opinions, including dicta (statements not necessary to the Court's holdings) in order to examine the concept structured by the metaphor of the marketplace.

THE METAPHOR IN COURT

In order to identify instances of the use of the metaphor by the Supreme Court, a computer-assisted key-word search was employed to examine Court opinions from 1925 to 1982. The computer was instructed to identify any First Amendment case in which specified terms involving messages appeared within

five words of terms involving either competition or commerce. These instructions were intended to identify opinions in which the exchange of ideas was compared to the exchange of goods and services.[31] The search yielded citations to 49 separate court cases relevant to this study. An examination of judicial opinions in these cases revealed thirty-six cases which contained opinions that used the economic metaphor to discuss diversity as well as other concepts. The discussion that follows is based on the language used in these opinions. Because this study aims to draw the metaphor out of the law, rather than the reverse, the issues in each case are discussed only to the extent necessary to provide a context for the metaphor.

The metaphor of the marketplace was employed in 41 different opinions written for 36 cases. One interesting aspect immediately apparent is that the metaphor has been used more in recent, rather than in past, years. The metaphor does not appear at all between 1925 and 1945. It appears in one case in 1945, 2 in the 1950s, 7 in the 1960s, 17 in the 1970s, and 9 from 1980-1982. Even allowing for the fact that many recent opinions quoted earlier ones, the use of the metaphor has increased. By removing opinions in which the only marketplace imagery were quotations from earlier opinions, we can identify the number of cases that include original expressions of the metaphor. This brings the total to 1 for the 1940s, 2 for the 1950s, 6 for the 1960s, 13 for the 1970s and 6 for 1980-1982. The metaphor may be based in the eighteenth century, but it appears to be more, rather than less, popular as the twentieth century proceeds.

The metaphor of the marketplace seems to be familiar to most members of the Court. Thirteen different justices authored these opinions, but in most instances they were joined by other justices. Justice Stevens used it the

most (7 times), followed by Brennan (6), Burger (5), Powell (5), Douglas (4). Blackmun (4), Rehnquist (2), and Fortas, Goldberg, Harlan, Marshall, and Rutledge (once each). There is no clear pattern according to type of opinion. Of 41 different opinions, 21 were opinions of the Court, 6 were concurring, 12 dissenting, and 2 were both concurring and dissenting. The metaphor was used in a wide range of cases. These include cases regarding libel, obscenity, labor organizing, boycotts, school libraries, soliciting, commercial speech, and the fairness doctrine. Some cases raised marginal First Amendment issues, such as a school financing case, and many focused more on freedom of association than on freedom of speech or press.

The Court's use of the metaphor includes numerous citations to Holmes's Abrams dissent as well as several original expressions of what might be called the "classic" marketplace concept. Justice Douglas's dissent in Dennis v. United States is one of these:

> When ideas compete in the market for acceptance, full and free discussion exposes the false and they gain few adherents. Full and free discussion even of ideas we hate encourages the testing of our own prejudices and preconceptions.[32]

This fairly standard expression of the metaphor explains the idea of diversity of ideas expressed by English Separatists, American rebels, Chaffee, and Holmes without further extending the metaphorical concept. Other judicial statements, however, express both the classic concept and extend the economic metaphor. These statements are organized below according to whether they focus on the marketplace, the participants, or the ideas for sale.

THE MARKETPLACE

The use of the word "marketplace" does more than relate to the language surrounding the "trade in ideas." It provides this activity with a location. By locating the process of trading, we can determine whether or not we are there. Several locations have been suggested. In an often-quoted remark in a 1967 opinion, Justice Brennan noted that "The classroom is peculiarly the 'marketplace of ideas'. The nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, rather than through any kind of authoritative selection.'"[33] The fact that Brennan was quoted by three other justices in different cases suggests that there is some judicial agreement about the classroom as a location for the marketplace. Brennan also located the marketplace at state fairs. "A state fair is truly a marketplace of ideas and a public forum for the communication of ideas and information. As one court states 'a fair is almost by definition a congeries of hawkers, vendors of wares and services, and purveyors of ideas, commercial, aesthetic, and intellectual.'"[34] Here the qualification of the state fair as an intellecutal marketplace relies more on the similarity of the "vendors of wares" to the "purveyors of ideas" than on the merits of the "robust exchange of ideas" cited in the schools cases.

In the cases involving schools and fairs the device of assigning the metaphorical marketplace a literal location helped the justices to argue in favor of a free exchange of ideas. The same device can be used to argue for limiting the exchange of ideas. In a case involving a shopping center, Justice Powell points out, "The State may not compel a person to affirm a belief he does not hold. . . . This principle on its face protects a person

who refuses to allow use of his property as a marketplace for the ideas of others."[35] Here the metaphor is enlarged. The marketplace is located on a piece of property, and property is owned. The property owner is not required to have a marketplace on the property, especially if the products sold are the ideas of others.

These examples show how the process of assigning a literal location to the metaphorical marketplace allows one to argue both in favor of and against the free exchange of ideas. Assigning the marketplace a metaphorical location can also do this. If we are <u>in</u> the marketplace, we may sell ideas freely, but if we are not, the competitive principle no longer applies. Justice Harlan's dissent in <u>Time</u> v. <u>Hill</u> demonstrates that the process of locating the marketplace allows one to defend restricting the exchange of ideas without giving up faith in the competitive process. Harlan first expresses his belief that "'The marketplace of ideas' where it functions still remains the best testing ground for truth." He does not believe, however, that this is the place:

> First, we cannot avoid recognizing that we have entered an area where the "marketplace of ideas" does not function and where the conclusions premised on the existence of that exchange are apt to be suspect. . . . To me this seems a clear recognition of the fact that falsehood is more easily tolerated where public attention creates the strong likelihood of a competition among ideas. Here such competition is extremely unlikely for . . . the matter is not one in which the public has an "independent interest."[36]

By suggesting that "we have entered an area" where competition is unlikely,

Harlan is able to define this area as one other than the marketplace, and therefore as an area in which the exchange of ideas may be restriced. This area, however, is not an actual location, such as a classroom, or a shopping center, or a fairground. It is an area of ideas.

By discussing the boundaries of the marketplace, the justices both draw on earlier, non-judicial writers and extend the metaphor. For example, in the school case, Brennan clearly draws on the Separatist belief that truth is discoverable. In this case as in the case of the state fair, he uses the idea of the marketplace to provide a context for other values. In the cases involving shopping centers and privacy, however, Powell and Harlan use concepts such as individual freedom, property rights, and lack of public attention as a context for the marketplace idea.

PRODUCERS AND CONSUMERS

In their use of the metaphor, members of the Court have also commented on those who participate in the market by selling and buying ideas. In this sense the image has been used to suggest that those involved in exchanging ideas have protections beyond rights to free speech. Justice Goldberg does this when he says, "The strong associational interest in maintaining the privacy of membership lists of groups engaged in the constitutionally protected free trade in ideas and beliefs may not be infringed upon. . . ."[37] And in a school financing case, Justice Powell reiterates the student's argument that one needs special skills to sell ideas. He says that "appellees argue that the right to speak is meaningless unless the speaker is capable of articulating his thoughts intelligently and persuasively. The 'marketplace of ideas' is an empty forum for those lacking basic communicative tools."[38]

The Right to Receive Information

The metaphor has also facilitated an interesting development in First Amendment law. The Amendment, which prohibits Congress from abridging "the freedom of speech, or of the press," is often thought of as protecting the right to speak, to write, to publish, or the right to sell ideas. Yet the metaphor helps us to include audiences under this protection. This is done by arguing that the Amendment exists to protect the marketplace itself, thus establishing rights for both speakers and audiences, producers and consumers.

The idea that audiences have rights has been expressed in terms other than those of the marketplace, but the idea is one which is especially well-suited to the use of the metaphor.[39] In an age that saw the development of the consumer rights movement, the Court has extended the concept to those who buy ideas. Brennan's concurring opinion in a postal case is a good example. "I think the right to receive ideas is such a fundamental right. The dissemination of ideas can accomplish nothing if otherwise unwilling addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers," he says.[40] Here Brennan articulates the ideas that audiences have rights by noting that a market must have consumers. This concept can be further extended by pointing out that a consumer's right to receive a product depends upon the seller's access to it. Justice Stevens does this when he argues in favor of journalists' having access to a jail. In his dissenting opinion he quotes Brennan and points out, "It would be an even more barren marketplace that had willing buyers and sellers and no meaningful information to exchange."[41]

Access and Fairness

Consumers' rights can be limited in another way. Producers may have

access to the products, but not to the marketplace itself. This would happen if the marketplace were monopolized. Justice White believed this was the case when he spoke for the Court when it upheld the constitutionality of the Federal Communication Commission's fairness doctrine:

> It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. . . . It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the government itself or a private licensee.[42]

In this case, Red Lion Broadcasting was refusing access to a man whom the broadcaster had attacked. Because the broadcaster was monopolizing the market, the Court approved of the FCC's requiring access to others who wanted to enter the market to sell their ideas. Yet shortly after Red Lion, the Court used the threat of a potential monopoly to argue that broadcasters were within their rights in refusing to accept editorial advertisements. According to Justice Burger, those who wished to buy time to sell their ideas might monopolize the market.

> The Commission was justified in concluding that the public interests in providing access to the marketplace if "ideas and experiences" would scarcely be served by a system so heavily weighted in favor of the financially affluent, or those with access to wealth. . . . Even under a first-come-first-served system . . . the views of the affluent could well prevail over those of others, since they would have it within their power to purchase time more frequently.

> Moreover, there is substantial danger . . . that the time allotted for editorial advertising could be monopolized by those of one political persuasion.[43]

In the Red Lion case, White's language suggests that a monopoly already exists, but in this case, Columbia Broadcasting v. Democratic National Committee, Burger's concern about potential monopolists suggests that free market conditions exist. By shifting assumptions about market conditions, one can use the metaphor both to support access requirements and to reject other kinds of access requirements.

The Democratic National Committee case is a good example of the flexibility the metaphor allows, for Brennan also uses it in his dissent and Douglas uses it in his concurring opinion. Brennan expresses his belief that "with the assistance of the Federal Government, the broadcast industry has become what is potentially the most efficient and effective 'marketplace of ideas' ever devised," and argues that "the most effective way to insure this 'uninhibited, robust, and wide-open' debate is by fostering a 'free trade in ideas' by making our forms of communication readily available to all persons wishing to express their views."[44] By focusing on the potential for freer exchange of ideas, rather than the potential for monopoly, Brennan defends a different conclusion using the same metaphor.

Douglas uses this image in the same case, but not to make a point about the potential which broadcasting provides for either free-market or monopoly conditions. Rather, he argues that broadcasters are "included in the concept of 'press' as used in the First Amendment and therefore are entitled to live under the laissez-faire regime which the First Amendment sanctions." In comparing broadcasting to newspapers, he suggests that both too often sell the

wrong things:

> TV and radio broadcasters have mined millions by selling merchandise, not in selling ideas across the broad spectrum of the First Amendment. But some newspapers have done precisely the same, loading their pages with advertisements; they publish, not discussions of critical issues confronting our society, but stories about murders, scandal, and slanderous matter touching the lives of public servants. . . ."[45]

Douglas's concern here is not for market conditions; it is for what is sold. There is a certain irony in his use of a commercial metaphor to deplore commercialization of both broadcasting and print.

The commercial image has allowed opinion writers to compare broadcasting and print not only because they sell similar things, but also because both media are dominated by large corporations. In Miami Herald v. Tornillo the Court ruled that a Florida right-to-reply statute was unconstitutional. Before ruling in favor of the newspaper, the Court considered the candidate's argument that at the time the First Amendment was adopted, a "true marketplace of ideas existed in which there was relatively easy access to the channels of communication." But, said Burger, "the same economic factors which have caused the disappearance of vast numbers of metropolitan newspapers have made entry into the marketplace of ideas served by the print media almost impossible." Summarizing the candidate's argument, Burger explains, "The First Amendment interest of the public in being informed is said to be in peril because the 'marketplace of ideas' is today a monopoly controlled by the owners of the market."[46] In reiterating this argument, Burger is recognizing the point Barron and Head and Sterling make; that the laissez-faire doctrine

that underlies the metaphor is inappropriate in a society dominated by the modern communications industries.

This particular use of the metaphor demonstrates how the use of the economic language to describe both the communication process and economic conditions can cause some confusion. The classic marketplace concept describes a situation in which ideas are goods or services, speakers and writers are producers, and audiences are consumers. Under the classic concept, ideas were bought and sold. By locating the area in which this activity occurs, we extend the concept to include a marketplace that is a piece of property which someone owns. This is particularly true in mass communication, where newspapers, magazines, and broadcasting stations are owned, not metaphorically but literally. They can be bought and sold, and can in turn sell (or more accurately rent) space and time to others. The existence of a mass communications industry has brought the metaphorical concept of marketplace together with the literal one.

Media Ownership

Because the same language is used to discuss the communication process and the communications industry, legal discussions of monopolies sometimes reflect a difficulty in distinguishing between the two. This is apparent in cases involving media ownership as well as those involving access and fairness. For example, in a case upholding the FCC's newspaper-broadcast divestiture order of 1975, Justice Marshall quoted the Commission's somewhat awkward attempt to distinguish between the metaphorical and the literal when he said, "The Commission concluded that . . . divestiture was warranted only in 'the most egregious cases' which it defined as those in which a newspaper-broadcast combination has an 'effective monopoly' in the local 'marketplace of

ideas as well as economically.'" Marshall concluded that this standard reflected a "a rational legislative-type judgement."[47] At first glance one might wonder how a monopoly might exist other than economically, but the language here rightly recognizes that there are two markets, and that the commercial market is related to the metaphorical market. It sounds confusing because the same language and the same concept are used for both.

In the statements discussed here, the justices draw on a variety of earlier articulations of the idea, and they also bring the metaphor into the twentieth century. These statements reflect not the Separatist faith in the power of "truth," but Mill's more pragmatic concerns with the mechanics of how the process operates. Chaffee's early articulation of the "social interest" inherent in the First Amendment takes on a modern form in the notion of the right to receive information. In spite of references to a laissez-faire system, their comments reflect the recognition of the concept of monopoly and the corellative notion of a regulated economy. Thus, they adapt the laissez-faire version of the metaphor expressed by Holmes to the notion that regulation is necessary to ensure competition.

THE IDEAS

One of the functions of the metaphor of the marketplace is that it is supposed to allow the government to remain neutral about the content of ideas. Under ideal market conditions, the value of an idea is determined by a self-regulating market. Even under less than ideal, or what some call "market failure" conditions, the government can regulate access to the marketplace rather than determining which ideas are sold or what their value is. The metaphor draws attention to the process of exchanging ideas rather than to the

nature of the ideas themselves. Nevertheless, some justices have used the metaphor to discuss ideas. Most judicial comments that used the metaphor in order to evaluate a specific idea occured in cases related to obscenity or involving commercial speech. These are categories of communication traditionally subject to legal restrictions. The metaphorical comments in these cases have two themes. One is whether the ideas in question have "value," the other is whether the ideas are too closely related to commercial activity to quality them for inclusion into the metaphorical marketplace. Both themes are used in both types of cases.

Obscenity

Since 1957 courts have agreed that materials that fit the legal definition of obscenity are without First Amendment protection. Thus it is not surprising that this is one of the few types of communication for which the Court directly discusses the ideas in the marketplace. One way of doing this is to argue that the materials in question are not really ideas; they are products. Burger suggests this when he dismisses Brennan's fears about the Court's ruling in Miller v. California. "Mr. Justice Brennan finds 'it is hard to see how state-ordered regimentation of our minds can ever be forestalled,'" he says. But, "These doleful anticipations assume that the courts cannot distinguish commerce in ideas, protected by the First Amendment, from commercial exploitation of obscene material."[48] By arguing that the communications in question were not ideas, but products, this statement suggests that they resemble too closely their counterparts in the concept upon which the metaphor is based.

Justice Blackmun raised a different issue--that of value--in his dissent in a 1976 case:

> The Court must never forget that the consequences of rigorously enforcing guarantees of the First Amendment are frequently unpleasant. Much speech that seems to be of little or no value will enter the marketplace of ideas, threatening the quality of our social discourse and, more generally, the serenity of our lives. But that is the price to be paid for constitutional freedom.[49]

Blackmun avoids evaluating the type of film in question here by using the word "seems." In an obscenity dissent the following year, Stevens is even less evaluative when he says, "We must rely on the capacity of the free marketplace of ideas to distinguish that which is useful and beautiful from that which is ugly or worthless."[50] It is probably no coincidence that the concept of value is directly tied to the metaphor in these expressions of support for free speech. It would be difficult to contend that an idea has no value in the same breath as one invokes the concept of a marketplace which determines value by means of competition. In this regard it is important to remember that obscenity was initially denied First Amendment protection because "<u>such utterances are no essential part of any exposition of ideas, and are of slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality</u>. . . ."[51] In that instance it was not the marketplace that determined the value of obscenity; it was the Supreme Court, and it is not surprising that no explicit marketplace language was used.

In only one instance did a justice in an obscenity-related case use the marketplace metaphor to negate the value of an idea. This was Stevens, who in a footnote in <u>FCC</u> v. <u>Pacifica Foundation</u> said, "We are assured by Pacifica and

that free play of market forces will discourage indecent programming. 'Smut may,' as Judge Leventhal put it, 'drive itself from the market and confound Gresham,'. . .; the prosperity of those who traffic in pornographic literature and films would appear to justify skepticism."[52] Judge Leventhal is a Circuit Court Judge who dissented from the U.S. Court of Appeals decision in the Pacifica case. According to the American Heritage Dictionary, Gresham's law is the theory that if two kinds of money in circulation have the same denomination value but different intrinsic values, the money with the higher intrinsic value will be hoarded and eventually driven out of circulation by the money with the lesser intrinsic value. Stevens' point is that assuming ideas and money are analagous, Gresham's law would predict that ideas with a higher value will be hoarded, and those with a lesser value (smut) will be circulated in the marketplace. If, however, the opposite occurred, and smut was driven out of circulation, this would "confound Gresham." Stevens apparently adheres to Greshams's theory in this instance, citing as evidence the money made by pornographers. This is a slightly confusing extension of the metaphor. For one thing, it equates ideas with money, rather than with products. Also, the point about those who "traffic" in pornography suggests that, as in Burger's comment in Miller, the ideas in question are not ideas at all; they are products. This suggestion is significant here because the material at issue in this case was not "pornographic literature and films," it was a radio satire about taboos regarding "filthy words."

Commercial Speech

The final area in which the justices used the metaphor to evaluate ideas is that of commercial speech. Advertising has traditionally not been accorded the same First Amendment protection as other forms of speech, but during the

1970's a series of Supreme Court decisions began to expand to constitutional protection of what is called commercial speech. It is in opinions written for these cases that the metaphor appears.

The first of these cases involved New York abortion advertisements which appeared in a newspaper in Virginia, a state where abortion was then illegal. In ruling against the state, Blackmun explained:

> To the extent that commercial activity is subject to regulation, the relationship of speech to that activity may be one factor, among others, to be considered in weighing the First Amendment interest against the governmental interest alleged. Advertising is not thereby stripped of all First Amendment protection. The relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas.[53]

In using the metaphor to discuss the relationship of the ideas in the metaphorical marketplace to the products to which they are analogous, Blackmun begins a debate with Rehnquist that is articulated in marketplace language. In a case one year later that involved advertising the prices for prescription drugs, Blackmun quoted his own statement in the earlier case, and drew a response from Rehnquist, who dissented:

> The logical consequence of the Court's decision in this case, a decision which elevated commercial intercourse between a seller hawking his wares and a buyer seeking to strike a bargain to the same plane as has been previously reserved for the free marketplace of ideas, are far reaching indeed.[54]

Rehnquist's language here not only reveals that he sees the metaphorical marketplace as distinct from the commerical one, but it also reflects his vision of where they are located. The marketplace of ideas is "elevated" on a different plane than the commercial one. His language further distinguishes them by emphasizing the crasser aspects of buying and selling. The participants in this market are not simply producing and consuming, they are hawking wares and trying to strike bargains.

Rehnquist is the justice who provides the most thoughtful articulation of the metaphor. Of all the judicial comments discussed here, Rehnquist's are the only ones that examine the metaphor as well as use it. In his dissent in a 1980 decision supporting a public utility's right to promote the use of electricity, Rehnquist discussed the metaphor at length. He begins by noting "the Court's frequent reference to the 'marketplace of ideas'", which he says is analagous to the laissez-faire commercial market described by Adam Smith in Wealth of Nations, and he quotes Holmes. He argues, however, that identifying speech under First Amendment protection "is not aided by the metaphorical reference," and then names several problems with its use. First, he questions the validity of the eighteenth century economic theory on which it is based, noting, "There is no reason for believing that the marketplace of ideas is free from market imperfections any more than there is to believe that the invisible hand will always lead to optimum economic decisions in the commercial market." He then points out that the marketplace concept is inconsistent with the Court's rulings that other types of speech, such as obscenity, were not protected by the First Amendment,[55] and notes that the limits that still remain for commercial speech are inconsistent with the laissez-faire idea. If the marketplace is the best test of truth, he argues,

"there is no reason whatsoever to limit the protection accorded commercial speech to 'truthful, nonmisleading, noncoercive speech. . . . If the 'commercial speech' is in fact misleading, the 'marketplace of ideas' will in time reveal this fact."[56]

Finally, Rehnquist contends that commercial and political speech are so unlike each other that the same concept cannot logically be applied to both. "Unfortunately," he says, "although the 'marketplace of ideas' has a historically and sensibly defined context in the world of political speech, it has virtually none in the realm of business transactions." He explains by extending the metaphor to encompass the notion of fraud, which he says does not exist in the metaphorical marketplace:

> For in the world of political advocacy and <u>its</u> marketplace of ideas, there is no such thing as a "fraudulent" idea; there may be useless proposals that will receive the imprimatur of the "marketplace of ideas" through our majoritarian system of election and representative government. The free flow of information is important in this context not because it will lead to the discovery of any objective "truth", but because it is essential to our system of government."

After demonstrating that the notion of fraud has no place in the metaphor, Rehnquist goes on to say that fraud has a place in both the commercial marketplace and the law.

> The notion that more speech is the remedy to expose falsehood and fallacies is wholly out of place in the commercial bazaar, where if applied logically the remedy

> of one who was defrauded would be merely a statement, available upon request, reciting the Latin maxim "caveat emptor." But . . . in this area . . . the remedy of one defrauded is a lawsuit or an agency proceeding based on common-law notions of fraud that are separated by a world of difference from the realm of politics and government.[57]

In this way Rehnquist rejects the concept on which the metaphor rests. Free speech, he says, functions not to discover the value of an idea, but to facilitate a system of representative democracy, a system that in turn stamps the "imprimatur" of the marketplace on ideas it considers sound. Although he notes that the metaphor has a "sensibly defined context" in regard to political speech, he implicitly rejects it in this context, too. By pointing out that the concept of fraud has no place here, he takes a concept from the commercial marketplace and applies it to the metaphorical one, emphasizing the logical deficiencies of the metaphor. At the same time, he takes the metaphor and applies it to the "commercial bazaar," demonstrating that the existence of common-law remedies for fraud is inconsistent with the use of the metaphor for commercial speech. In his analysis and rejection of this image, Rehnquist is rejecting not only the metaphor, but also the concept of unregulated competition it expresses.

CONCLUSION

According to McGee, "Human beings are 'conditioned' not directly to belief and behavior, but to a vocabulary of concepts that function as guides, warrants, reasons, or excuses for behavior and belief." These vocabularies are culture-bound, and function as "conditions of the society into which each of

us is born, material ideas which we must accept to 'belong.'"[58] In this paper I have examined the "marketplace of ideas" as an concept which one must accept in order to "belong" to the community of jurists and writers who talk about the First Amendment. Its roots are in an image of truth competing with falsehood which arose as a political argument in the 1500s, and which probably has origins before that time. This vital image in Reformation politics became part of the political language of the American colonies during the 1700s. Despite its popularity in political life, it appears not to have been accepted as part of the language of the common law until a number of influential people became concerned about free speech cases after World War I.[59] These people persuaded (either directly or indirectly) a Supreme Court Justice to write the truth-over-falsehood slogan into a court opinion, where it was expressed as an economic metaphor. Thus, up to 1919, the image had several "lives:" its life in the Reformation, in the American Revolution, in the writings of legal critics, and finally, in the common law.

In the second part of this paper, I have explained how the image functions as a metaphor in Supreme Court opinions. It provides "guides, warrants, reasons, or excuses" for judicial decisions. Its accepted meaning among First Amendment scholars is the idea that when ideas compete for acceptance, free of regulation, audiences will accept the good (or true) ideas and reject the bad (or false) ideas. Yet its use by Supreme Court justices reveals that it has extended meanings. As a metaphor, the "marketplace of ideas" draws upon a whole structure of economic terms which have had changing significations. Although the image is composed of terms which suggest commitment to a laissez-faire principle, its expression as an economic analogy allows justices to draw on concepts such as regulated monopolies, Gresham's

law, and the like. This allows both commitment to a shared concept and flexibility in decision-making.

This study suggests several directions for future research. First, it raises questions about the pairing of economic and intellectual freedom in our society. As a British observer notes:

> Freedom of speech and freedom to buy and sell in a free and open market are two fundamental liberties guaranteed to all Americans which are not to be infringed even if they were to bring the society to anarchy and dissolution. Their justification lies not in their beneficial conseqences but in themselves.[60]

Some critics have deplored the commercial metaphor, but one could also argue that a commercialized society which honors free enterprise accords a powerful protection to intellectual freedom by according it the use of its vocabulary. The notion that we buy and sell ideas and its expression in political argument and other extra-legal forums warrants examination.

Second, this study raises questions about how language functions in judicial opinions. Black's Law Dictionary tells us that the principle of stare decisis, or adherence to precedent, applies only to established principles of law and not to obiter dicta, comments made by a judge which are not necessary to the decision of the case, "introduced by way of illustration or analogy or argument."[61] In spite of difficulties in distinguishing dicta from legal principles, it is clear that the "marketplace of ideas" concept appears mostly in dicta. Yet its pervasive use and the fact that justices so often quote each other's articulations of it suggests that the professed logic of stare decisis may really describe an ingrained habit judges have of quoting each other, regardless of the "legal" classification of the remark. Legal scholars already

study judicial opinions by examining the development of precedent and legal argument. These judicial opinions can also be examined as linguistic texts.[62] Concepts used to talk about the First Amendment (I am thinking of terms like "chilling effect") that do not necessarily have precedential value, may shape judicial opinions by providing a way of expressing a shared consciousness. Examination of these terms might inform our understanding of how appellate courts understand their environments.

NOTES

[1]Douglas H. Ginsburg, Regulation of Broadcasting: Law and Policy Towards Radio, Television and Cable Communication (St. Paul: West, 1979), p. 204.

[2]Donald M. Gillmor and Jerome A. Barron, Mass Communication Law: Cases and Comment. 3rd. ed. (St. Paul: West, 1979), p. 3.

[3]John Murray, The Media Law Dictionary (University Press of America, 1978), p. 62.

[4]Fredrick S. Siebert, Freedom of the Press in England 1476-1776: The Rise and Decline of Government Controls (Urbana: Univ. of Illinois Press, 1952), p. 191. For an excellent description of the early use of the truth-over-falsehood image, see Jeffery A. Smith, "Freedom of Expression and the Marketplace of Ideas Concept From Milton to Jefferson," Journal of Communication Inquiry,7 (Summer 1981), pp. 47-64.

[5]Carl Stephenson and Frederick George Marcham, eds. Sources of English Constitutional History (New York: Harper and Brothers, 1397), p. 368, and Siebert, p. 101.

[6]Siebert, p. 194.

[7]William Haller, ed., Tracts on Liberty in the Puritan Revolution, Vol. I (New York: Columbia University Press, 1934), p. 78.

[8]John Milton, quoted in John D. Stevens, Shaping the First Amendment: The Development of Free Expression (Beverly Hills: Sage, 1982), pp. 27-28.

[9]Haller, Vol. I, p. 139, and Siebert, p. 383.

[10]Quoting Benjamin Franklin's 1731 "An Apology for Printers," in Leonard W. Levy, ed., Freedom of the Press from Zenger to Jefferson: Early American Libertarian Theories (New York: Bobbs Merrill, 1966), p. 5. See also George

Hay's 1799 "Essay on the Liberty of the Press, in Levy, pp. 186-187, Thomas Jefferson's First Inaugural Address, in Levy, pp. 357-359, and Thomas Cooper's "On the Propriety and Expediency of Unlimited Enquiry," in Harold L. Nelson, ed., Freedom of the Press form Hamilton to the Warren Court (New York: Bobbs-Merrill, 1967), pp. 6-7.

[11]Smith, p. 59.

[12]J. S. Mill, On Liberty, ed., Gertrude Himelfarb (New York: Penguin Books, 1977), pp. 115-116.

[13]David M. Rabban, "The First Amendment in Its Forgotten Years," Yale Law Journal, 90 (1981), 520, 524.

[14]Fred D. Ragan, "Justice Oliver Wendell Homes, Jr., Zechariah Chaffee, Jr., and the Clear and Present Danger Test for Free Speech: The First Year, 1919," Journal of American History, 58 (1971), 37.

[15]Zechariah Chaffee, "Freedom of Speech," The New Republic, 16 November 1918, p. 67.

[16]Zechariah Chaffee, "Freedom of Speech in War Time", Harvard Law Review, 32 (1919), 958-959.

[17]Rabban, pp. 595, 594, 590-591.

[18]Ragan, p. 43.

[19]Abrams v. United States, 250 U.S. 616 (1919), Brief for Plaintiffs-In-Error, pp. 48-49.

[20]250 U.S. 161 (Holmes dissenting at 630).

[21]Although the OED lists several figurative uses of the words "Market" and "Marketplace", it does not include a reference to the intellectual marketplace. There was also no reference in numerous quotation dictionaries which I consulted.

[22]Zechariah Chafee, Jr., Government and Mass Communications (Chicago: Univ. of Chicago Press, 1943), I, 21-29, rpt. Harold L. Nelson, ed., Freedom of the Press: From Hamilton to the Warren Court (New York: Bobbs-Merrill, 1967), p. 32.

[23]Frederick Schauer, Free Speech: A Philosophical Enquiry (Cambridge: Cambridge Univ. Press, 1982), p. 26.

[24]George Anastaplo, The Constitutionalist: Notes on the First Amendment (Dallas: Southern Methodist Univ. Press, 1971), p. 264.

[25]Walter Berns, The First Amendment and the Future of American Democracy (New York: Basic Books, 1976), p. 154, and Gary J. Jacobsohn, Pragmatism, Statesmanship, and the Supreme Court (Ithaca: Cornell Univ. Press, 1977), p. 93.

[26]Schauer, pp. 20. 21-22.

[27]C. Edwin Baker, "Scope of the First Amendment Freedom of Speech," UCLA Law Review, 25 (1978), 974 and 967.

[28]Jerome A. Barron, Freedom of the Press for Whom? The Right of Access to Mass Media (Bloomington: Indiana Univ. Press, 1973), p. 320.

[29] Sidney Head with Christopher H. Sterling, Broadcasting in America, 4th ed. (Boston: Houghton Mifflin, 1982), pp. 486-487.

[30]George Lakoff and Mark Johnson, Metaphors We Live By (Chicago: Univ. of Chicago Press, 1980), p. 61.

[31]The system used was LEXIS. The data were drawn from the Opinions segment of the Supreme Court file of the General Federal Library. The instructions were designed to identify any opinion in which the words "market, marketplace, trade, competition, compete, competing, monopoly monopolize, monopolization, diverse, diversity, collide, collision, clash," appear within

five words of the words "idea, view, viewpoint, opinion, advocate, voice, channel." An AND connector limited the search to cases in which numeric variations of the word "first" appeared within one word of "amendment." The words used in the search were based on my observation of the language justices have used in such cases, and my imagination of other words justices might use to describe this concept. The search listed 150 case citations, many to cases which had nothing to do with communication or the First Amendment. These cases were read first by 14 trained undergraduate students who photocopied the syllabus and first page of each case and then completed a classification sheet describing the case. I then read every case syllabus using the classification sheet for additional information and in many instances read the entire case itself. Many cases had nothing to do with communication or the First Amendment and many had nothing to do with diversity. The appearance of these cases indicates the search was overly broad, but this breath, together with the appearance 49 cases that were relevant, makes me confident that the search was exhaustive.

[32]Dennis v. United States, 341 U.S. 494, 584 (1951).

[33]Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967). Quoted in Tinker v. Des Moines School District, 393 U.S. 503, 512 (1969), Healy v. James, 408 U.S. 169, 180 (1972), and New Rider v. Board of Education, 414 U.S. 1097, cert. denied (1973, Douglas dissenting at 1100-1101).

[34]Concurring and dissenting in Hefron v. International Society for Krishna Consciousness, 452 U.S. 640, 658, n. 2. Brennan is quoting U.S. District Court Judge Patrick Higginbotham's opinion in International Society for Krishna Consciousness v. State Fair of Texas, 461 F. Supp. 719, 721 (1978).

[35]Concurring in PruneYard Shopping Center v. Robins, 447 U.S. 74, 97 (1980).

[36]Concurring and dissenting at 383 U.S. 374, 406 and 407 (1967).

[37]Gibson v. Florida Legislative Committee, 372 U.S. 539, 555 (1967).

[38]San Antonio School District v. Rodriguez, 411 U.S. 1, 35 (1973).

[39]A good examination of the right to receive ideas is provided by Gerald J. Baldasty and Roger A. Simpson in "The Deceptive 'Right to Know': How Pessimism Rewrote the First Amendment," in Charlene J. Brown and Bill F. Chamberlin, eds., The First Amendment Reconsidered: New Perspectives on the Meaning of Freedom of Speech and Press (New York: Longman, 1982), pp. 62-88.

[40]Lamont v. Postmaster General, 381 U.S. 301, 308 (1965).

[41]Dissenting in Houchins v. KQED, 438 U.S. 1, 32, n. 22 (1978).

[42]Red Lion Broadcasting v. FCC, 395 U.S. 367, 390 (1969).

[43]Columbia Broadcasting v. Democratic National Committee, 412 U.S. 94, 123 (1973).

[44]Brennan dissenting at 195 and 184.

[45]Douglas concurring at 161.

[46]418 U.S. 241, 248 and 251 (1974).

[47]FCC v. National Citizens Committee, 436 U.S. 775, 787 and 814 (1978).

[48]413 U.S. 15, 36 (1973).

[49]Young v. American Mini Theatres, 427 U.S. 50, 88 (1976).

[50]Smith v. United States, 431 U.S. 291, 321 (1977).

[51]Roth v. United States, 354 U.S. 476, 484 (1957).

[52]438 U.S. 726, 744, n. 19 (1978).

[53]Bigelow v. Virginia, 421, U.S. 809, 826 (1975).

[54]Virginia Board of Pharmacy v. Virginia Consumer Council 425 U.S. 748

(1976, Blackmun at 760, Rehnquist dissenting at 781).

[55]Central Hudson Gas & Electric v. Public Service Commission, 447 U.S. 557, 592 (1980).

[56]at 596-597.

[57]at 597-598.

[58]Michael Calvin McGee, "The Ideograph: A Link Between Rhetoric and Ideology," Quarterly Journal of Speech, 66 (1980), 9.

[59]Rabban, pp. 10, 15.

[60]Christie Davies, "How Our Rulers Argue about Censorship," in Rajeev Dhavan and Christie Davies, eds., Censorship and Obscenity (Totowa, N.J.: Rowman and Littlefield, 1978), p. 21.

[61]For an explanation of how this is supposed to work, see Edward H. Levi, An Introduction to Legal Reasoning (Chicago: Univ. of Chicago Press, 1949).

[62]Until recently, locating these terms would not have been possible, because legal digests, indexes, and citators are not organized according to rhetorical terms. People with access to computer search systems such as WESTLAW and LEXIS are now able to construct their own indexing system, as I have done here.

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